

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL A. GONZALEZ,

Petitioner,

v.

CONNIE GIPSON, warden,

Respondent.

Case No. [14-cv-04995-EMC](#)

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

**I. INTRODUCTION**

Miguel A. Gonzalez filed this *pro se* action for a writ of habeas corpus under 28 U.S.C. § 2254. The Court issued an order to show cause why the writ should not be granted. Respondent has filed an answer and Mr. Gonzalez has filed a traverse. For the reasons explained below, the petition will be **DENIED**.

**II. BACKGROUND**

On April 15, 2008, Mr. Gonzalez entered a guilty plea in Santa Cruz County Superior Court to four felonies in four separate cases in a bundled plea agreement. He pled guilty to aiding and abetting a felony assault in Case No. F16220, assault with a deadly weapon while on bail or own recognizance in Case No. WF00200, armed robbery with a deadly weapon in Case No. WF00210, and assault with a deadly weapon with personal infliction of great bodily injury and a gang enhancement in Case No. WF00212.<sup>1</sup> Mr. Gonzalez was sentenced on July 15, 2008 to 12 years in state prison. No appeal was taken. Mr. Gonzalez did file petitions for writ of habeas

---

<sup>1</sup> The first crime occurred on January 10, 2007; the second crime occurred at about 7:00 p.m. on February 29, 2008; the third crime occurred at about 8:45 p.m. on February 29, 2008; and the fourth crime occurred at about 12:30 a.m. on March 1, 2008. *See* Resp. Ex. I (probation officer's presentencing report).

1 corpus in the state courts.

2 The petition for writ of habeas corpus in this action challenges only one of the four  
3 convictions covered by that plea agreement. Specifically, Mr. Gonzalez challenges his conviction  
4 in Case No. WF00200. Three years of the 12-year sentence are attributable to Case No.  
5 WF00200, as Mr. Gonzalez received one year for the assault with a deadly weapon plus two years  
6 for committing the crime while out of jail on bail or on his own recognizance.

7 A. The Crime

8 The probation officer's presentencing report provided the following summary of the crime.  
9 (Unlike the presumption of correctness that applies to a state court's factual findings, see 28  
10 U.S.C. § 2254(e), no presumption of correctness applies to the probation officer's statement of the  
11 facts.)

12 On February 29, 2008, at approximately 7:22 p.m., officers were  
13 dispatched to 580 Auto Center Drive regarding a large fight that had  
14 just occurred. Upon arrival, officers made contact with two victims,  
15 Jorge Mendoza and Jaime Mendoza. Both victims had been  
16 stabbed. Jorge was noticeably bleeding from his chest and left area  
17 and Jaime had a stab wound to his left hand. Medical personnel  
18 treated the injured parties and Jorge was transported to the hospital  
19 via an ambulance.

20 Jaime Mendoza sustained a puncture wound on his left forearm and  
21 a puncture wound to his left hand. Jorge Mendoza sustained a  
22 puncture wound to his right forearm, a puncture wound to the left  
23 side of his chest, two puncture wounds to the front of his left  
24 shoulder, two puncture wounds to the upper rear of his left shoulder  
25 and a swollen right eye. Jorge Mendoza had to be life flighted to a  
26 nearby trauma center in San Jose due to the extent of his injuries.

27 Jorge Mendoza's younger son, Jorge Jr., and witness to the events  
28 was contacted and reported that at 7:00 p.m., he was at the bowling  
alley with his son and nephew. After bowling, Jorge Jr. called his  
father, Jorge and his brother, Jaime, to pick them up. They all met  
up and were walking towards the exit when he noticed five to six  
Hispanic male adults and juveniles outside. Jorge Jr. had never seen  
the group of males before. As they were walking out, one of the  
subjects walked up to his brother, Jaime and began what seemed like  
a friendly conversation. While the two were talking, another subject  
opened the door and told the first subject to "Come outside" in  
Spanish. Everyone walked outside, and once they were outside, the  
second subject swung at Jaime with a closed fist. Jorge Jr. advised  
that he rushed the second subject, but then saw that his father, Jorge,  
was being jumped by several subjects. Jorge Jr. did not recall seeing  
any weapons and stated that since everything happened so quickly, it  
was difficult to see whom had punched whom.

Jaime Mendoza reported that he was familiar with the suspects that had attacked him and provided the nicknames, "Termite," "Peligroso" and "Boxer." Jaime mentioned that these three males were members of the Watsonville criminal street gang, City Hall Watsonville. During the course of the investigation, officers figured out that Pedro Garcia Zuniga goes by the moniker, "Termite" and that "Peligroso" was listed as a moniker for Miguel Angel Gonzalez. Jaime Mendoza was later shown photo lineups of both suspects, and positively identified them as his attackers. Jaime related that Zuniga was the one [who] challenged him to a fight and that Gonzalez had stabbed his father Jorge approximately six times with an unknown object.

On March 1, 2008, at approximately 12:55 a.m., while officers were responding to a stabbing that occurred on Eureka Canyon Road, a felony car stop was made. Both Zuniga and Gonzalez were found in the vehicle and taken into custody.

Resp. Ex. I at 4-5. (The stabbing on Eureka Canyon Road led to the charges in Santa Cruz County Superior Court Case No. WF00212.)

B. The Sole Eyewitness Recants And Habeas Challenges Ensur

Although Jaime Mendoza initially identified Mr. Gonzalez as the man who stabbed his father Jorge Mendoza, Jaime Mendoza later changed his story and denied that Mr. Gonzalez had stabbed his father. Jaime Mendoza's changing story led to state habeas proceedings and forms the basis for all of Mr. Gonzalez's federal habeas claims.

In 2011, Mr. Gonzales filed a *pro se* habeas petition in the Santa Cruz County Superior Court. That court eventually issued an order to show cause on a claim regarding newly discovered evidence and appointed counsel for Mr. Gonzalez. An evidentiary hearing was held on May 2, 2013, at which Jaime Mendoza and other witnesses testified. On May 24, 2013, the superior court filed an order denying the habeas petition. Mr. Gonzalez later filed habeas petitions in the California Court of Appeal and the California Supreme Court; both petitions were denied without comment.

Mr. Gonzalez then filed this action. In his federal petition for writ of habeas corpus, Mr. Gonzalez alleges that his guilty plea and the conviction in Case No. WF00200 violated due process and must be set aside because (1) they were "obtained by [the prosecution's] known use of false evidence," Docket No. 1 at 6; (2) the prosecutor withheld exculpatory *Brady* evidence; and (3) he is actually innocent. The Court issued an order to show cause why the writ should not be

1 granted. Respondent has filed an answer and Mr. Gonzalez has filed a traverse. The matter is  
 2 now ready for a decision on the merits.

### 3 **III. JURISDICTION AND VENUE**

4 This Court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C.  
 5 § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition concerns the  
 6 conviction and sentence of a person convicted in Santa Cruz County, California, which is within  
 7 this judicial district. 28 U.S.C. §§ 84, 2241(d).

### 8 **IV. STANDARD OF REVIEW**

9 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in  
 10 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
 11 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

12 The Antiterrorism And Effective Death Penalty Act of 1996 (“AEDPA”) amended § 2254  
 13 to impose new restrictions on federal habeas review. A petition may not be granted with respect to  
 14 any claim that was adjudicated on the merits in state court unless the state court’s adjudication of  
 15 the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application  
 16 of, clearly established Federal law, as determined by the Supreme Court of the United States; or  
 17 (2) resulted in a decision that was based on an unreasonable determination of the facts in light of  
 18 the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

19 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court  
 20 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if  
 21 the state court decides a case differently than [the] Court has on a set of materially  
 22 indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

23 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if  
 24 the state court identifies the correct governing legal principle from [the Supreme] Court’s  
 25 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413.  
 26 “[A] federal habeas court may not issue the writ simply because that court concludes in its  
 27 independent judgment that the relevant state-court decision applied clearly established federal law  
 28 erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. “A

1 federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state  
2 court’s application of clearly established federal law was ‘objectively unreasonable.’” *Id.* at 409.

3 Section 2254(d) generally applies to unexplained as well as reasoned decisions. “When a  
4 federal claim has been presented to a state court and the state court has denied relief, it may be  
5 presumed that the state court adjudicated the claim on the merits in the absence of any indication  
6 or state-law procedural principles to the contrary.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011).  
7 When the state court has denied a federal constitutional claim on the merits without explanation,  
8 the federal habeas court “must determine what arguments or theories supported or . . . could have  
9 supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists  
10 could disagree that those arguments or theories are inconsistent with the holding in a prior  
11 decision of [the U.S. Supreme] Court.” *Id.* at 102.

## 12 V. DISCUSSION

### 13 A. The Recanting Witness

14 Jaime Mendoza initially identified Mr. Gonzalez as the man who stabbed his father, but  
15 later changed his story and denied that Mr. Gonzalez stabbed his father. Over the course of time,  
16 Jaime Mendoza went from initially stating that Mr. Gonzalez stabbed him and his father, to stating  
17 that Mr. Gonzalez stabbed only his father, to stating that Mr. Gonzalez did not stab his father.  
18 Jaime Mendoza’s statement was the only evidence identifying Mr. Gonzalez as the stabber.  
19 Docket No. 2 at 37-39 (stipulation in state habeas proceedings that Jamie Mendoza’s statement is  
20 the only witness against Mr. Gonzalez). Jaime Mendoza’s changing story forms the basis for all  
21 of Mr. Gonzalez’s federal habeas claims. To analyze the claims, it is first necessary to set out a  
22 chronology of events, with a summary of Jaime Mendoza’s several statements.

- 23 • February 29, 2008 - Jaime and Jorge Mendoza, Sr. are stabbed.  
24 Jaime Mendoza tells police that Peligroso stabbed him and his father.
- 25 • March 1, 2008 - Jaime Mendoza picks Mr. Gonzalez in a photo lineup.
- 26 • March 11, 2008 - Jaime Mendoza tells defense investigator that  
27 Mr. Gonzalez stabbed him and his father.
- 28 • April 15, 2008 - Mr. Gonzalez pleads guilty in a bundled plea deal.
- July 15, 2008 - Mr. Gonzalez is sentenced.

- 1 • July 17, 2008 - Pedro Zuniga's preliminary hearing is held.  
Jaime Mendoza testifies that Mr. Gonzalez stabbed his father but he (Jaime)  
2 did not see who stabbed him (Jaime).  
Jaime Mendoza allegedly tells police officers before the hearing that he is  
3 recanting. Prosecutor learns from Mr. Zuniga's public defender that Jaime  
Mendoza is recanting.
- 4 • May 25, 2011 - Jaime Mendoza tells defense investigator that Mr. Gonzalez  
5 was not involved in either stabbing.
- 6 • January 8, 2012 - Jaime Mendoza fully recants. He states in a declaration that  
7 he lied to the police and lied in court at Mr. Zuniga's preliminary hearing. He  
states further that Mr. Gonzalez was not involved in stabbing him or his father.
- 8 • May 2, 2013 - Evidentiary hearing on Mr. Gonzalez's habeas petition is held in  
9 Santa Cruz County Superior Court.  
Jaime Mendoza testifies that Mr. Gonzalez did not stab him or his father.

10 The above time-line shows the sequence and essence of the changing statements. It also is  
11 helpful to note the substance of some of the statements.

12 The police reports indicate that Jaime Mendoza identified Mr. Gonzalez, who was also  
13 referred to as "Peligroso" or "City Hall" as the person who stabbed both Jaime and Jorge  
14 Mendoza, Sr. Docket No. 2 at 6-20.

15 At Mr. Zuniga's preliminary hearing, on July 17, 2008, Jaime Mendoza identified Mr.  
16 Gonzalez as the man who stabbed his father, but testified that he did not remember who stabbed  
17 him (i.e., Jaime Mendoza). Docket No. Ex. 8-5, July 17, 2008 hearing RT 18, 19, 27. Jaime  
18 Mendoza denied that Mr. Zuniga took part in the stabbing, although he had told police on the night  
19 of the stabbing that Mr. Zuniga was one of the attackers. *Id.* at 21. Jaime Mendoza testified that  
20 he had known Mr. Gonzalez for about two years; he denied knowing anything about Mr.  
21 Gonzalez's gang affiliation; and he denied telling his mother and sister in a phone call after the  
22 stabbing that they had been "jumped by City Hallers," a Watsonville gang. *Id.* at 27, 30-31, 33.  
23 Jaime Mendoza testified that on March 13, 2008 -- two weeks after stabbing -- someone tried to  
24 set his car on fire; although he no longer thought it was in retaliation for talking to the police, he  
25 would not identify who set the car on fire. *Id.* at 47, 49. At Mr. Gonzalez's evidentiary hearing in  
26 2013, Jaime Mendoza testified that he was not telling the truth at the Zuniga preliminary hearing  
27 when he identified Mr. Gonzalez as the man who stabbed his father. Docket No. 8-2, May 2, 2013  
28 hearing RT 13. When asked by the court why he testified at the Zuniga preliminary hearing that

Mr. Gonzalez stabbed his father if he had just told the police outside the courtroom that it was a lie, Jaime Mendoza insisted that he did testify at the preliminary hearing that Mr. Gonzalez did not stab his father. *Id.* at 21-22. Jaime Mendoza later backtracked after being shown his testimony from the Zuniga preliminary hearing at which he identified Mr. Gonzalez as the man who stabbed his father. *Id.* at 38. Later, when the court asked him why he had not told the judge at the Zuniga preliminary hearing that everything he had said to the police had been a lie, Jaime Mendoza responded, “because nobody asked me” and he “really [did not] know about court.” *Id.* at 50. Jaime Mendoza testified that he told officer McKinley that he felt he and his family were in jeopardy after he (Jaime) provided the names of the attackers. *Id.* at 29. Jaime Mendoza testified that he did not think that his car had been set on fire in retaliation and denied that he had told officers that it was retaliatory, although once shown the police report, he agreed that he told an officer that it was retaliatory. *Id.* at 34-36). He also testified that in 2012, three unknown men tried to break into his house and he “got in a little scuffle” with them before they fled. *Id.* at 36-37. Jaime Mendoza testified that he “just wanted to move on with [his] life,” wanted this case to be over with, and was worried about his and his family’s safety when he signed the declaration recanting his identification of Mr. Gonzalez, yet claimed not to be afraid at the evidentiary hearing. *Id.* at 42-43, 53.

At the end of the evidentiary hearing on Mr. Gonzalez’s habeas petition, the superior court discussed the standards for obtaining relief in state court and determined that Mr. Gonzalez had not met the standard. *Id.* at 99-102.

B. Brady Claim

1. Background

Mr. Gonzalez contends that the prosecutor failed to disclose to him that Jaime Mendoza had recanted his identification of Mr. Gonzalez as the stabber. This, contends Mr. Gonzalez, violated his rights under *Brady v. Maryland* and its progeny.

This claim was rejected without comment by the California Supreme Court. Docket No. 1 at 48. There is no lower state court decision containing a reasoned explanation for the denial of the *Brady* claim. The Santa Cruz County Superior Court did not adjudicate the *Brady* claim. Mr.



Gonzalez did not present a *Brady* claim in his original petition or his first amended petition in that court. The evidentiary hearing that was held in the Santa Cruz County Superior Court on May 2, 2013 appears to have been devoted exclusively to determining whether Mr. Gonzalez had demonstrated actual innocence under state law standards. After that evidentiary hearing, the superior court orally denied the petition and directed respondent's counsel to prepare a written order memorializing that ruling. Before the written order was prepared, Mr. Gonzalez sought leave to file a motion to amend his first amended habeas petition to add a *Brady* claim. The superior court denied his request for leave to file a motion to amend. Docket No. 8-3 at 4 (May 24, 2013 superior court order). Because Mr. Gonzalez was not allowed to amend, the superior court did not actually rule on the merits of the *Brady* claim.

Even if the Santa Cruz County Superior Court's denial of Mr. Gonzalez's request for leave to file a motion to amend his first amended petition is considered to be a denial of his *Brady* claim, there was no reasoning articulated for such a denial. Moreover, the superior court did not have the same evidence in support of the *Brady* claim that Mr. Gonzalez marshaled for his petitions for writ of habeas corpus to the California Supreme Court and to this court. At the time the superior court denied Mr. Gonzalez's request for leave to amend, Mr. Gonzalez had not yet obtained or presented his investigator's declaration that (a) the prosecutor said he had learned before the Zuniga preliminary examination that Mr. Gonzalez was recanting, and that the prosecutor had learned about the recantation from a report obtained from Mr. Zuniga's counsel, and (b) police officers were aware of the recantation before the Zuniga preliminary examination. For all these reasons, the Santa Cruz County Superior Court's decision is not the decision to which § 2254(d) is applied for purposes of evaluating the *Brady* claim.

When, as here, the state court has denied a federal constitutional claim on the merits without explanation, the federal habeas court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the U.S. Supreme] Court." *Harrington*, 562 U.S. at 102.



1 Here, the claim was presented to and rejected without comment by the California Supreme  
2 Court.

3 2. Analysis

4 In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that “the suppression  
5 by the prosecution of evidence favorable to an accused upon request violates due process where  
6 the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith  
7 of the prosecution.” *Id.* at 87. The Supreme Court has since made clear that the duty encompasses  
8 impeachment evidence as well as exculpatory evidence. See *United States v. Bagley*, 473 U.S.  
9 667, 676 (1985). “[E]vidence is ‘material’ within the meaning of *Brady* when there is a  
10 reasonable probability that, had the evidence been disclosed, the result of the proceeding would  
11 have been different.” *Cone v. Bell*, 556 U.S. 449, 469–470 (2009). “A reasonable probability does  
12 not mean that the defendant ‘would more likely than not have received a different verdict with the  
13 evidence,’ only that the likelihood of a different result is great enough to ‘undermine[ ] confidence  
14 in the outcome of the trial.’” *Smith v. Cain*, 132 S. Ct. 627 (2012) (alteration in original).

15 Here, Jaime Mendoza’s statements recanting his identification of Mr. Gonzalez as the  
16 stabber would be *Brady* material if they had not been disclosed before a trial. The statements were  
17 favorable to Mr. Gonzalez and were not disclosed to him. The statements would have met the  
18 materiality standard. Evidence that impeaches an eyewitness “may not be material if the State’s  
19 other evidence is strong enough to sustain confidence in the verdict,” but such is not the case when  
20 the eyewitness’ testimony is the only evidence linking the defendant to the crime. *Smith*, 132 S.  
21 Ct. at 630 (overturning conviction because undisclosed evidence that eyewitness told police  
22 detective at the time of the crime that he could not see or identify the perpetrators was “plainly  
23 material” impeachment material where that eyewitness testified that defendant was the perpetrator  
24 and his testimony was the only evidence implicating defendant in the crime). Here, Jaime  
25 Mendoza’s statements were exculpatory rather than just impeachment material, because (unlike  
26 the witness in *Smith*) he did not merely state that he could not see who stabbed his father but  
27 affirmatively stated that Mr. Gonzalez was not the person who stabbed his father.

28 The problem for Mr. Gonzalez is that the nondisclosure of the exculpatory materials

1 occurred in a case in which he pled guilty rather than went to trial. To obtain federal habeas relief,  
 2 he must show that the California Supreme Court's rejection of his claim was contrary to, or an  
 3 unreasonable application, of a U.S. Supreme Court holding, but the U.S. Supreme Court has never  
 4 issued a holding covering his circumstances. The U.S. Supreme Court has never held that  
 5 disclosure of *exculpatory* *Brady* material is required *before* a guilty plea is entered. The only U.S.  
 6 Supreme Court case addressing *Brady* material in the guilty-plea context addressed impeachment  
 7 material and held that disclosure of *impeachment* *Brady* material is not required before a guilty  
 8 plea is entered. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

9 In *Ruiz*, the U.S. Supreme Court held that the "Constitution does not require the  
 10 Government to disclose material impeachment evidence prior to entering a plea agreement with a  
 11 criminal defendant." *Ruiz*, 536 U.S. at 633. By pleading guilty, a defendant "foregoes not only a  
 12 fair trial, but also other accompanying constitutional guarantees," such as the privilege against  
 13 self-incrimination, as well as the rights to confront one's accusers and to trial by jury. *Id.* at 628-  
 14 29 (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)). "Given the seriousness of the matter,  
 15 the Constitution insists, among other things, that the defendant enter a guilty plea that is  
 16 'voluntary' and that the defendant must make related waivers 'knowing[ly], intelligent[ly], [and]  
 17 with sufficient awareness of the relevant circumstances and likely consequences.'" *Id.* at 629  
 18 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970) (alterations in original)). But this does  
 19 not necessarily mean that impeachment information must be disclosed before a guilty plea may be  
 20 entered. *See id.*

21 [I]mpeachment information is special in relation to the *fairness of a*  
 22 *trial*, not in respect to whether a plea is *voluntary* ("knowing,"  
 23 "intelligent," and "sufficient[ly] aware"). Of course, the more  
 24 information the defendant has, the more aware he is of the likely  
 25 consequences of a plea, waiver, or decision, and the wiser that  
 26 decision will likely be. But the Constitution does not require the  
 27 prosecutor to share all useful information with the defendant.  
 28 *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L.Ed.2d  
 30 (1977) ("There is no general constitutional right to discovery in a  
 criminal case"). And the law ordinarily considers a waiver  
 knowing, intelligent, and sufficiently aware if the defendant fully  
 understands the nature of the right and how it would likely apply *in*  
*general* in the circumstances--even though the defendant may not  
 know the *specific detailed* consequences of invoking it. A  
 defendant, for example, may waive his right to remain silent, his

right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.

*Ruiz*, 536 U.S. at 629-30 (second alteration in original). The Supreme Court also explained that the Constitution “does not require complete knowledge of the relevant circumstances” before a defendant may plead guilty. *Id.* at 630. The *Ruiz* Court rejected the Ninth Circuit’s view that a guilty plea is not voluntary unless the prosecutors first made the same disclosure of material impeachment information that the prosecutors would have to make under *Brady* if the defendant chose to go to trial. *See id.* at 629, 632.

There is disagreement in the lower courts as to whether *Ruiz* applies to exculpatory evidence, as discussed in *Robertson v. Lucas*, 753 F.3d 606, 621 (6th Cir. 2014):

*Ruiz* established that *impeachment* material need only be disclosed for trial. *See United States v. Wells*, 260 F. App’x. 902, 903–04 (6th Cir.2008). Appellants contend that the evidence at issue was *exculpatory* and therefore not covered by the rule set forth in *Ruiz*. We have not yet had occasion to determine whether *Ruiz* applies to exculpatory *Brady* material, a question that has caused some disagreement among our sister circuits. *Compare United States v. Ohiri*, 133 F. App’x. 555, 562 (10th Cir.2005) (“[T]he Supreme Court did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government’s possession.”) and *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir.2003) (“*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence.”), with *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir.2010) (“[T]he Supreme Court has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial, and the reasoning underlying *Ruiz* could support a similar ruling for a prosecutor’s obligations prior to a guilty plea.”) (internal citations omitted) and *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) (“*Ruiz* never makes such a distinction nor can this proposition be implied from its discussion.”).

*Robertson*, 753 F.3d at 621.<sup>2</sup> The Ninth Circuit has not yet decided, in a case to which the

---

<sup>2</sup> The source of the disagreement in the circuits about the applicability of *Ruiz* to exculpatory evidence appears to stem from the particular circumstances in *Ruiz*. In *Ruiz*, the plea agreement pursuant to which the defendant pled guilty had provisions stating that “any [known] information establishing the factual innocence of the defendant” “has been turned over to the defendant,” “acknowledged the Government’s ““continuing duty to provide such information,”” and required the defendant to waive the right to receive impeachment information and information about any

1 AEDPA applied, whether *Ruiz* does or does not require disclosure of exculpatory *Brady* material.

2 Given the lack of a holding from the U.S. Supreme Court that exculpatory *Brady* material  
3 must be disclosed before a defendant pleads guilty, the California Supreme Court's rejection of  
4 Mr. Gonzalez's claim cannot be said to be "contrary to, or an unreasonable application of, clearly  
5 established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. §  
6 2254(d)(1). Indeed, the divergence of views among the circuits as to whether *Ruiz* requires or  
7 does not require disclosure of exculpatory *Brady* material shows that "fairminded jurists could  
8 disagree," *Harrington v. Richter*, 562 U.S. at 102, as to whether the California Supreme Court's  
9 rejection of Mr. Gonzalez's claim is inconsistent with a prior decision of the Supreme Court. "[A]  
10 state court's determination that is consistent with many sister circuits' interpretations of Supreme  
11 Court precedent, even if inconsistent with [the Ninth Circuit's] own view, is unlikely to be  
12 'contrary to, or involve an unreasonable application of, clearly established Federal law, as  
13 determined by the Supreme Court.'" *Kessee v. Mendoza-Powers*, 574 F.3d 675, 677 (9th Cir.  
14 2009); see e.g., *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006) (noting that lower courts' wide  
15 divergence in treatment of spectator misconduct claims reflected "lack of guidance" from Supreme  
16 Court, and thus "it cannot be said that the state court unreasonably applied clearly established  
17 Federal law"); *Mann v. Beard*, 2016 WL 1583665, at \*2 (9th Cir. Apr. 20, 2016) (unpublished)

18  
19 affirmative defense the defendant might raise at trial. *Ruiz*, 536 U.S. at 625 (alteration in original).  
20 The defendant refused to agree to the plea agreement because of the waiver of the right to receive  
21 impeachment and affirmative defense evidence. *Id.* Later, she pled guilty without any plea  
22 agreement and was denied a two-level downward departure in sentencing that the government  
23 would have recommended had she accepted the plea agreement. *Id.* at 626. To resolve whether  
24 the plea agreement was constitutionally impermissible and the defendant should be resentenced,  
25 the Supreme Court had to "decide whether the Constitution requires that preguilty plea disclosure  
26 of impeachment information." *Id.* at 629. The Supreme Court couched its discussion in terms of  
27 impeachment evidence, and specifically pointed out that the proposed plea agreement included a  
28 representation that the Government would turn over any information establishing factual  
innocence of the defendant. *Id.* at 630-31.

Some courts that have found that *Ruiz* does support a right to exculpatory *Brady* material  
in the guilty-plea context appear to rest their conclusions on the fact that the Supreme Court in  
*Brady* focused on impeachment evidence and took pains to note that the Government retained the  
obligation under the plea agreement to disclose evidence establishing factual innocence. Courts  
that have gone the other way have relied on the Supreme Court's longstanding lack of a distinction  
between exculpatory and impeachment evidence for *Brady* purposes, as well as the fact that the  
exculpatory evidence question was not actually presented or resolved in *Ruiz*.

1 (“Indeed, in light of this circuit’s own split, fairminded jurists could disagree whether the . . .  
2 filing of a felony complaint . . . triggered the protections of the Sixth Amendment.”). Mr.  
3 Gonzalez is not entitled to relief on his *Brady* claim.

4 The Court notes that there are some evidentiary gaps about the *Brady* material in this case,  
5 but those gaps need not be filled because relief on the *Brady* claim is barred by § 2254(d)(1) due  
6 to the absence of a Supreme Court holding on point. The first gap in the evidence is that it is  
7 unclear exactly when the prosecutor and police became aware that Jaime Mendoza was recanting.  
8 Mr. Gonzalez’s evidence shows that the prosecutor and one or more police officers were aware of  
9 some sort of recantation *before* the Zuniga preliminary hearing, but does not show how far in  
10 advance of the Zuniga preliminary hearing they became aware of the recantation. If a *Brady* claim  
11 could be entertained, the timing could matter because Mr. Gonzalez was sentenced two days  
12 before the Zuniga preliminary hearing, and the prosecution may not even have known of the  
13 recantation at the time of Mr. Gonzalez’s sentencing (as would have occurred if, for example, the  
14 prosecutor and police only learned of the recantation on their way into court on the day of the  
15 Zuniga preliminary hearing).<sup>3</sup> The second gap concerns the source of the information provided to  
16 the prosecution. The prosecutor told Mr. Gonzalez’s investigator that he learned of the recantation  
17 from a report provided by Zuniga’s public defender, yet the investigator (who presented a detailed  
18 declaration about his efforts to learn whether and when the prosecution learned of the recantation)  
19 provides no information as to any efforts to obtain the report from Mr. Zuniga’s public defender or  
20 to ask that public defender when he shared the information with the prosecutor. It is at least odd  
21 that a petitioner’s presentation of his claim that was otherwise quite thorough would not include  
22 information about the report obtained from Mr. Zuniga’s public defender. If Mr. Zuniga’s public  
23 defender did not share the report with the prosecution until the day of the Zuniga preliminary  
24

---

25 <sup>3</sup> There is disagreement among the circuits as to how long the *Brady* duty continues. *Compare*  
26 *Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003) (*Brady* duty applies, before and during trial,  
27 as well as after conviction), *and Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (*Brady* duty  
28 includes information obtained during and even after trial), *with Bell v. Bell*, 512 F.3d 223, 234 (6th  
Cir. 2008) (declining to extend *Brady* to post-trial witness’ favorable treatment), *and United States*  
*v. Maldonado-Rivera*, 489 F.3d 60 (1st Cir. 2007) (evidence unknown to prosecutor until after  
trial is not *Brady* material).

hearing, it would provide further support that the prosecutor was not aware of the *Brady* material at Mr. Gonzalez's sentencing hearing two days earlier. As noted above, however, the absence of a Supreme Court holding precludes relief on the *Brady* claim so the gaps in the evidence to support the claim need not be filled. Mr. Gonzalez is not entitled to relief on his *Brady* claim.

C. Napue Claim

1. Background

Mr. Gonzalez also contends that his plea should be set aside because it was based on the prosecutor's knowing presentation of false evidence. He contends that his "guilty plea was induced by false evidence presented at his change of plea and sentencing hearing in the form of an offer of proof." Docket No. 1 at 28. He urges that the prosecutor "knew or should have known that Jaime Mendoza" was not implicating Mr. Gonzalez in the stabbing. *Id.*

At the change-of-plea hearing on April 15, 2008, after Mr. Gonzalez was advised of and waived his rights, the following occurred:

[THE COURT:] Turning to WF00200, let me get the plea first.

THE DEFENDANT: Guilty.

[THE PROSECUTOR]: Your Honor, the factual basis for this case is that in the City of Watsonville the defendant assaulted Jorge Mendoza, Sr, causing great bodily injury or causing serious bodily injury nearly within the meaning of Penal Code Section 245 not as a separate and discreet allegation.

THE COURT: Factual basis, how do you plea that on or about March 1st of '08 in the County of Santa Cruz you did violate Penal Code Section 245(a)(1) which is a felony and again committed assault by means of force likely to produce great bodily injury, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: I accept that plea as being freely and voluntarily made.

4/15/08 RT at 11-12. At the sentencing hearing two months later, an issue arose as to the proper calculation of the sentence to reach the agreed-upon 12-year prison sentence for the several offenses. The parties and the court determined to solve the problem with Mr. Gonzalez admitting that he committed the assault on Jorge Mendoza, Sr., while he was out on his own recognizance.



7/15/08 RT at 9. The facts of the crime were not discussed at the sentencing hearing.

The California Supreme Court rejected the *Napue* claim without discussion. When, as here, the state court has denied a federal constitutional claim on the merits without explanation, the federal habeas court “must determine what arguments or theories supported or . . . could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the U.S. Supreme] Court.” *Harrington*, 562 U.S. at 102.

## 2. Analysis

A fundamental principle guiding the conduct of the prosecutor, as the representative of a sovereign in this country, is “not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). From this principle flow the rules that the prosecutor may not hide evidence and may not let false evidence go uncorrected at trial. *Cf. Strickler v. Greene*, 527 U.S. 263, 280-82 (1999). When a prosecutor obtains a conviction by the use of testimony which he knows or should know is perjured, the conviction must be set aside if there is any reasonable likelihood that the testimony could have affected the judgment of the jury. *See United States v. Agurs*, 427 U.S. 97, 103 (1976); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (same result obtains when State, although not soliciting false evidence, allows it to go uncorrected when it appears). This principle applies to matters of witness credibility as well as direct evidence of guilt. *See Napue*, 360 U.S. at 269. To prevail on a claim of prosecutorial misconduct for use of false witness testimony, a petitioner must show that (1) the testimony was actually false, (2) the prosecution knew or should have known that the testimony was false, and (3) the false testimony was material. *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003) (citing *Napue*, 360 U.S. at 269-71); *see also Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (prosecutor’s action in presenting false evidence to the jury and by failing to correct the record violated petitioner’s rights).

For a *Napue* claim, false testimony is material if there is “any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103 (1976). “This materiality standard is, in effect, a form of harmless error review, but a



1 far lesser showing of harm is required under *Napue*'s materiality standard than under ordinary  
2 harmless error review. *Napue* requires [the court] to determine only whether the error *could* have  
3 affected the judgment of the jury, whereas ordinary harmless error review requires [the court] to  
4 determine whether the error *would* have done so." *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir.  
5 2013) (citations omitted).

6 Mr. Gonzalez argues that his guilty plea "was induced by false evidence presented at his  
7 change of plea and sentencing hearing in the form of an offer of proof." Docket No. 1 at 28. Mr.  
8 Gonzalez's *Napue* claim falters on all three prongs. First, Mr. Gonzalez has not shown that the  
9 prosecutor's statement of the factual basis<sup>4</sup> for a plea amounts to testimony or evidence, such that  
10 it comes under the *Napue* rule. Second, he has not shown that the statement was false, at least  
11 expressly so. The prosecutor did not mention Jaime Mendoza, let alone make a representation  
12 about Jaime Mendoza's veracity. Third, even assuming *arguendo* that a prosecutor's statement of  
13 the factual basis for a plea could be considered false testimony or evidence (because its assertion  
14 could only have been based on Jaime Mendoza's identification of Gonzalez), Mr. Gonzalez has  
15 not shown that the prosecutor knew it to be false at the time she made the statement. That is, the  
16 statement was made at a hearing on April 15, 2008; yet Jaime Mendoza did not inform any  
17 prosecutor or police officer of his recantation until three months later, at about the time of the  
18 Zuniga preliminary hearing on July 17, 2008. At the time the prosecutor made her "factual basis"  
19 statement, Jaime Mendoza had not begun his efforts to recant; to the contrary, the only statements  
20 from Jaime Mendoza at that point clearly identified Mr. Gonzalez as the man who stabbed Jorge  
21 Mendoza, Sr. Jaime Mendoza had identified Mr. Gonzalez as the stabber at the scene of the crime  
22 and at the police station; Jaime Mendoza had picked Mr. Gonzalez out of a photo lineup; and  
23 Jaime Mendoza had identified Mr. Gonzalez as the stabber in his initial statement made to Mr.  
24 Gonzalez's investigator. The California Supreme Court reasonably could have found that Mr.

25  
26  
27 <sup>4</sup> The "factual basis" statement was not a constitutional necessity for the plea. *See Loftis v.*  
28 *Almager*, 704 F.3d 645, 647-48 (9th Cir. 2012) (there is no constitutional requirement that a state  
trial court find a factual basis for a no-contest plea that is not accompanied by protestations of  
innocence).

1 Gonzalez's *Napue* claim failed on each of the three elements of a *Napue* claim.<sup>5</sup>

2 Even assuming arguendo that *Napue* applies when a defendant has pled guilty -- a question  
3 this Court need not reach -- the California Supreme Court's rejection of the *Napue* claim would  
4 not have been an unreasonable application of, or contrary to, any clearly established law as set  
5 forth by the U.S. Supreme Court. Mr. Gonzalez is not entitled to the writ on this claim.

6 D. Actual Innocence Claim

7 Mr. Gonzalez contends that he is actually innocent. He urges that his actual innocence is  
8 shown by the fact that Jaime Mendoza has recanted, because Jaime Mendoza's identification of  
9 Mr. Gonzalez as the stabber was the only evidence against Mr. Gonzalez.

10 Mr. Gonzalez asserted in his petition for writ of habeas corpus in the California Supreme  
11 Court that "[n]ewly discovered evidence showing that Petitioner is unquestionably innocent of the  
12 offense(s) herein" shows a violation of his federal constitutional rights. Docket No. 8-3 at 11.<sup>6</sup>  
13 The California Supreme Court rejected the claim without discussion. When, as here, the state  
14 court has denied a federal constitutional claim on the merits without explanation, the federal  
15 habeas court "must determine what arguments or theories supported or . . . could have supported,  
16 the state court's decision; and then it must ask whether it is possible fairminded jurists could  
17 disagree that those arguments or theories are inconsistent with the holding in a prior decision of  
18 [the U.S. Supreme] Court." *Harrington*, 562 U.S. at 102.

19 \_\_\_\_\_  
20 <sup>5</sup> Unlike Respondent, this Court does not read this claim as a challenge to the voluntary and  
21 intelligent nature of the guilty plea. Mr. Gonzalez does not challenge the nature and quality of his  
22 attorney's advice to plead guilty, or otherwise fault his attorney for the plea deal, which would be  
23 the only avenue for relief in terms of the knowing and voluntary nature of the plea. "Where, as  
24 here, a defendant is represented by counsel during the plea process and enters his plea upon the  
25 advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within  
the range of competence demanded of attorneys in criminal cases.' . . . [A] defendant who pleads  
guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the  
guilty plea by showing that the advice he received from counsel'" was deficient. *Hill v. Lockhart*,  
474 U.S. 52, 56–57 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759 (1970), and *Tollett v.*  
*Henderson*, 411 U.S. 258, 267 (1973)).

26 <sup>6</sup> This Court cannot determine whether Mr. Gonzalez presented a federal-constitution-based actual  
27 innocence claim to the Santa Cruz County Superior Court because neither Mr. Gonzalez nor  
28 Respondent filed a copy of that state habeas petition. The Santa Cruz County Superior Court's  
order denying the habeas petition only mentioned a state-law-based actual innocence claim and  
did not discuss any actual innocence claim under federal law. *See* Docket No. 8-3 at 3-4.

Mr. Gonzalez is not entitled to relief on his claim that he is actually innocent. There are two problems with this claim: (a) the absence of a holding from the Supreme Court that a freestanding actual innocence claim can support federal habeas relief, and (b) the factual showing is too weak to support relief, even if habeas relief was available for an actual innocence claim.

“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.” *Herrera v. Collins*, 506 U.S. 390, 400 (1993); *see also House v. Bell*, 547 U.S. 518, 555 (2006); *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (“Whether such a federal right [to be released upon proof of actual innocence] exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.”).<sup>7</sup> Just recently, the Ninth Circuit observed that it is “still an open question” whether federal habeas relief is available based on a freestanding claim of actual innocence. *Taylor v. Beard*, 811 F.3d 326, 334 (9th Cir. 2016) (en banc) (citing *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013)).

Given the lack of a holding from the U.S. Supreme Court that there is a constitutional right to release based upon a showing of actual innocence, the California Supreme Court’s rejection of Mr. Gonzalez’s claim cannot be said to be “contrary to, or an unreasonable application of, clearly

---

<sup>7</sup> Allegations of actual innocence have a specific procedural purpose in the federal habeas context that is not applicable to Mr. Gonzalez’s case. A federal court may hear the merits of successive, abusive, procedurally defaulted, or untimely claims if the failure to hear the claims would constitute a miscarriage of justice. The Supreme Court limits the “miscarriage of justice” exception to habeas petitioners who can show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Under this exception, a petitioner may establish a procedural “gateway” permitting review of defaulted claims if he demonstrates “actual innocence.” *Schlup*, 513 U.S. at 316 & n.32; *see McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (*Schlup* actual innocence gateway available to excuse untimely petition). “[I]f a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.” *Schlup*, 513 U.S. at 316. Here, Mr. Gonzalez does not need to rely on the *Schlup* actual innocence gateway to have his other federal habeas claims considered because there is no federal habeas procedural problem with Mr. Gonzalez’s federal habeas claims. His other federal habeas claims have been adjudicated on the merits and not rejected for some procedural reason such as a procedural bar or untimeliness.

1 established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. §  
2 2254(d)(1).

3 Further, Mr. Gonzalez has not shown that he is actually innocent, even assuming *arguendo*  
4 that such a claim could support federal habeas relief. His evidence that the only witness against  
5 him has recanted does not establish his actual innocence. Recantations are looked upon with  
6 skepticism, and in this case there is reason for skepticism -- a gang backdrop and facts suggesting  
7 the recantation was the product of fear of retaliation.

8 The case of *Jones v. Taylor*, 763 F.3d 1242 (9th Cir. 2014), is instructive on evaluating  
9 recanting witnesses. There, the petitioner had been convicted of sexual assault of his 9-year-old  
10 sister based on testimony from the victim, their father, and the victim’s sister. Several years after  
11 the conviction, petitioner sought habeas relief based on the fact that the three witnesses recanted  
12 their testimony. The district court granted habeas relief on a freestanding actual innocence claim,  
13 and the Ninth Circuit reversed. *Id.* at 1246. The Ninth Circuit noted that it had not resolved  
14 “whether a freestanding actual innocence claim is cognizable in the non-capital context, although  
15 [it had] assumed that such a claim is viable,” *id.* at 1246, but found it unnecessary to decide  
16 whether such a claim was cognizable because the petitioner had not made a sufficient showing.  
17 *Id.* at 1246. The court was skeptical of the recantations and explained that they were insufficient to  
18 establish actual innocence under the high standards set by the Supreme Court.

19 [Jones’ evidence] is all in the form of recantation testimony,  
20 uncorroborated by any other evidence. As a general matter,  
21 “[r]ecantation testimony is properly viewed with great suspicion.”  
22 *Dobbert v. Wainwright*, 468 U.S. 1231, 1233, 105 S. Ct. 34, 82  
23 L.Ed.2d 925 (1984) (Brennan, J., dissenting from denial of  
24 certiorari); *see also Allen v. Woodford*, 395 F.3d 979, 994 (9th Cir.  
25 2005). “Recanting testimony is easy to find but difficult to confirm  
26 or refute: witnesses forget, witnesses disappear, witnesses with  
27 personal motives change their stories many times, before and after  
28 trial.” *Carriger*, 132 F.3d at 483 (Kozinski, J., dissenting). “It upsets  
society’s interest in the finality of convictions, is very often  
unreliable and given for suspect motives....” *Dobbert*, 468 U.S. at  
1233–34, 105 S. Ct. 34. For these reasons, a witness’ “later  
recantation of his trial testimony does not render his earlier  
testimony false.” *Allen*, 395 F.3d at 994; *see also Christian v.*  
*Frank*, 595 F.3d 1076, 1084 n. 11 (9th Cir.2010). Rather, a witness’  
recantation is considered in addition to his trial testimony and in the  
context in which he recanted when assessing the likely impact it

would have on jurors. *See Christian*, 595 F.3d at 1084 n. 11 (considering the timing of the witness' recantation and the contents of his earlier testimony in assessing the weight of the recantation); *Graves v. Cockrell*, 351 F.3d 143, 153 (5th Cir.2003) (noting that a recanting witness had given numerous contradictory statements in assessing the weight to give to his new testimony).

*Jones*, 763 F.3d at 1248. The Ninth Circuit was skeptical of the recantations because, among other things, they were all from family members, "which reduces their weight and reliability." *Id.* at 1249 (citing *House*, 547 U.S. at 552 (noting that testimony by friends or relations of the accused might have less probative value than testimony from disinterested witnesses); *McCray v. Vasbinder*, 499 F.3d 568, 573 (6th Cir. 2007) (noting that family members might have a personal stake in a defendant's exoneration).)

More importantly, the Ninth Circuit concluded in *Jones* that, even if the recantations were accepted as truthful, the recantations were insufficient to demonstrate actual innocence. Two of the three witnesses had heard alleged confessions and had not witnessed the abuse, so "their testimony is of little weight in the actual innocence analysis." *Jones*, 763 F.3d at 1249. That left the victim's recantation "as the most compelling evidence of Jones' innocence" but even that was insufficient to establish actual innocence because the Ninth Circuit could not "say that every juror would credit her recantation testimony over her trial testimony and the descriptions of the abuse she gave in her 2000 and 2002 interviews." *Jones*, 763 F.3d at 1250. Her recantation did not occur until 13 years after the events, and a reasonable juror could conclude that her memory faded or changed, and therefore could credit the testimony closer in time to the sexual assault. Also, issues related to her misunderstanding of her anatomy had been raised at the trial, yet the jury voted to convict.

The most that can be said of the new testimony is that it undercuts the evidence presented at trial. Evidence that merely undercuts trial testimony or casts doubt on the petitioner's guilt, but does not affirmatively prove innocence, is insufficient to merit relief on a freestanding claim of actual innocence. *See House*, 547 U.S. at 555, 126 S. Ct. 2064 (rejecting freestanding actual innocence claim even though the petitioner had "cast considerable doubt on his guilt"); *Jackson*, 211 F.3d at 1165 (rejecting a freestanding actual innocence claim even though the petitioner's new evidence "certainly cast doubt on his conviction"); *Carriger*, 132 F.3d at 477 (rejecting a freestanding claim when the postconviction evidence "serve[d] only

1 to undercut the evidence presented at trial, not affirmatively to prove  
2 [the petitioner's] innocence").

3 There is no "new and reliable physical evidence, such as DNA, that  
4 would preclude any possibility of [Jones's] guilt." *Carriger*, 132  
5 F.3d at 477. Nor is there scientific or testimonial evidence even as  
6 persuasive as the evidence in *House* and *Jackson*, which was found  
7 to be insufficient. The recantations here are not from disinterested  
8 eyewitnesses, and, although victim recantation might in some  
9 instances be evidence of innocence, *see Gandarela*, 286 F.3d at  
10 1086, for the reasons discussed above, the recantation here is not  
11 sufficiently reliable that we can conclude that every juror would  
12 credit it.

13 *Jones*, 763 F.3d at 1251.

14 Here, Mr. Gonzalez has not shown that he is actually innocent. Although unlike *House*  
15 and *Jones*, there is no other testimonial evidence supporting the conviction, there was a guilty plea  
16 here. This weighs against the finding of actual innocence. At the change-of-plea hearing, Mr.  
17 Gonzalez stated that he was guilty of assault with a deadly weapon. "[T]he representations of the  
18 defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the  
19 judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings.  
20 Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*,  
21 431 U.S. 63, 73-74 (1977).

22 Although, unlike the situation in *Jones*, Jaime Mendoza did not have a familial relationship  
23 with the defendant that made his recantation suspect, there were two other circumstances that cast  
24 doubt on the verity of his recantation. The first circumstance was that Jaime Mendoza's  
25 recantation of his identification of Mr. Gonzalez (who was connected to the Watsonville City  
26 Hallers criminal street gang) occurred after Jaime Mendoza's car was set on fire. On the night his  
27 car was torched, Jaime Mendoza told a police officer that he believed the car had been set on fire  
28 to retaliate against him for cooperating with the police. Although Jaime Mendoza later stated that  
he had decided that the arson was not a retaliatory act, one could disbelieve his disavowal of his  
earlier belief. A recantation by a witness who thinks he is being retaliated against for cooperating  
with police in investigating a crime committed by a gang affiliate is of doubtful credibility.

The other circumstance casting doubt on Jaime Mendoza's recantation was the fact that he  
lied about his earlier inculpatory statements and only admitted to making them when confronted



with objective evidence that he had made the statements. Two examples highlight this problem. First, at the evidentiary hearing on May 2, 2013, Jaime Mendoza testified that he did not recall telling officer McKinley that someone named Peligroso (i.e., Mr. Gonzalez's street moniker) stabbed both him and his father; Jaime Mendoza only admitted that he had made the statement to officer McKinley after he was confronted with the police report showing the statement. 5/2/13 RT 7-9. At the same evidentiary hearing, when confronted with the contradictory behavior of both recanting to the police officers outside the Zuniga preliminary hearing and testifying at that same preliminary hearing that Mr. Gonzalez *did* stab his father, Jaime Mendoza insisted that he had testified at the preliminary hearing that everything he had told the police at the time of the stabbing was a lie, 5/2/13 RT 21-23, and only admitted that he did not recant while testifying at the Zuniga preliminary hearing after being shown the transcript of his testimony, 5/2/13 RT 38. This latter falsity is particularly glaring because, after the Zuniga preliminary hearing and before Mr. Gonzalez's evidentiary hearing, Jaime Mendoza signed a declaration in which he recanted his testimony at the Zuniga preliminary hearing, and that declaration shows that he knew he had inculpated Mr. Gonzalez at the preliminary hearing.

In sum, the evidence that Jaime Mendoza recanted his identification of Mr. Gonzalez as the stabber would not demonstrate actual innocence because the Court cannot say that "every juror would credit [his] recantation testimony" over his earlier statements to police (made close in time to the incident) and at the Zuniga preliminary hearing which identified Mr. Gonzalez as the person who stabbed his father. *See Jones*, 763 F.3d at 1250. There is no new and reliable physical evidence that precludes any possibility of Mr. Gonzalez's guilt. *See id.* at 1251. A trier of fact would be presented with conflicting statements from an eyewitness and no physical evidence pointing toward or away from guilt. That state of the evidence is not enough to support a finding of actual innocence, even if such federal habeas relief was generally available upon a showing of actual innocence. Mr. Gonzalez is not entitled to the writ on his actual innocence claim.

E. No Certificate of Appealability

A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in which "reasonable jurists would find the district court's assessment of the constitutional claims




1 debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a certificate of  
2 appealability is **DENIED**.

3 **VI. CONCLUSION**

4 For the foregoing reasons, the petition for writ of habeas corpus is **DENIED** on the merits.  
5 The Clerk shall close the file.

6  
7 **IT IS SO ORDERED.**

8  
9 Dated: May 31, 2016

10   
11 EDWARD M. CHEN  
12 United States District Judge  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28